

CHIDAMBARAM CHETTIAR v. MURUGAPPA CHETTIAR & ORS.

[O. C. J. (Spenser Wilkinson J.) February 7, 1949]

[K. L. — Civil Suit No. 79 of 1948]

Civil Procedure — Pending action — Application for appointment of interim receiver — Injunction.

In this case the plaintiff applied for the appointment of an interim receiver of certain properties, to which the plaintiff claimed to be entitled to a half share. The property included of businesses in Klang and Malacca and immovable properties in Selangor, Malacca and Negri Sembilan. The plaintiff had filed caveats against the immovable properties in Selangor and Negri Sembilan and the defendant said he was prepared to give an undertaking to the Court not to part with the properties pending the determination of the suit.

Held: the undertaking by the defendant not to deal with or dispose of any of the assets in question in this suit would secure the plaintiff's position and therefore this was not a case in which an injunction would be granted.

Cases referred to :—

- (1) *Setapak Tin Syndicate Limited & Anor. v. Choo Kim Peng* (1947) M.L.J. 174.
- (2) *Wilson v. Greenwood* 1 Swan. 48.
- (3) *Peacock v. Peacock* 16 Ves. Jr. 49.
- (4) *Tucker v. Prior* 31 Sol. J. 784.

APPLICATION for appointment on interim receiver.

B. J. P. Joaquim for the plaintiff.

W. G. W. Hastings (M. N. Cumarasami with him) for the defendants.

Spenser Wilkinson J. : — This was an application by the plaintiff for the appointment of an interim receiver of the properties the subject matter of the suit which consist of a business called K.M. CT. at Klang and a business called K.M. CT. at Malacca together with certain immovable properties in Selangor, Malacca and Negri Sembilan. The plaintiff's claim in the suit is for a declaration that he is entitled to a half share in these properties which he alleges are joint family properties or alternatively partnership properties.

The properties in question have been the subject of litigation in the Courts in India between the present plaintiff and the defendant and in those proceedings it appears that the Indian Courts have held that the plaintiff and the defendant are each entitled to a half share in various businesses and properties in India, Burma and Malaya, including the properties now in question, on the basis that they are family properties. In the course of those proceedings the present defendant was appointed receiver of the properties by the Indian

Courts, but later on the defendant gave up the receivership and agreed to the appointment of the present plaintiff as receiver in his place. The Courts in India purported to appoint these parties as receivers of the whole of the joint family properties including those situated in Burma and Malaya, but there can, I think, be no doubt that, in so far as the properties in the Federation are concerned, the appointment by the Courts in India of a receiver was of no effect.

In the course of the proceedings in the Courts in India the present defendant asserted that by an agreement in writing made in 1937 the properties in question should be divided as from March, 1936 and that the two parties should be deemed to be partners in equal shares of all the firms situated in India, Malaya and Burma and that the legal relationship between the plaintiff and defendant was that of co-partners. These contentions were not accepted by the Courts in India because the agreement upon which they were based had not been registered and therefore was inadmissible in those Courts.

The plaintiff has made various allegations in his affidavit in support of the present application of improper conduct on the part of the defendant in respect of the properties. He alleges that various immovable properties have been sold at what he says is an under-valuation; that the defendant has overdrawn the firm's banking account in Malacca to the full extent, and has also done this at Klang; and that he has allowed his agent to draw too much salary. In reply to the defendant's answer that the sale of the immovable properties has been effected in order to pay off certain decree holders the plaintiff points to the fact that the decree holders who have been paid off are all relatives of the defendant and that the decrees of strangers have not been paid.

The defendant denies that the sales which have been effected were at an under-valuation and states that he is fully prepared to account for all money expended by him.

In regard to the immovable properties of which the plaintiff has knowledge caveats have been filed in those places where registration of title exists. It is apparently not possible to register a caveat or a *lis pendens* in respect of properties in Malacca, but in regard to the Malacca properties the defendant, in paragraph 7 of his affidavit, states that he is prepared to give an undertaking to the Court not to part with these pending the determination of the suit—an

undertaking which was repeated on his behalf by Counsel at the hearing.

The general principles upon which the Courts act in appointing an interim receiver have been clearly laid down in the case of *Setapak Tin Syndicate Limited & Anor. v. Choo Kim Peng*⁽¹⁾ where it was held that before an interim receiver will be appointed the Court must be satisfied:—

- (i) that the plaintiff has established a good *prima facie* claim to title, and also
- (ii) that the property is in jeopardy, or
- (iii) at the very least that the party who makes the application will be in a worse situation if the appointment of a receiver is delayed.

On the basis of the material before me I am satisfied that the plaintiff has established at least a *prima facie* claim to title. Whether his title rests upon his being a member of a joint Hindu family or upon his being a partner is a matter which I need not go into at this stage of the proceedings, though it seems to me that the claim on the basis of partnership is the stronger by reason of the admissions made by the defendant in the Indian proceedings.

Dealing with this matter, therefore, from the position which seems most favourable to the plaintiff, namely that of partnership, I must consider whether or not he has made out a sufficient case for the appointment of an interim receiver. Whilst it is true that in partnership cases the Court will appoint a receiver if the defendant wrongfully excludes his co-partner from the management of the partnership affairs (*Wilson v. Greenwood*⁽²⁾), yet the Court, as a rule, declines to appoint a receiver in cases where a partnership is alleged on one side and denied on the other until that issue has been determined. (*Peacock v. Peacock*⁽³⁾; *Tucker v. Prior*⁽⁴⁾ and cases cited in note (p) on p. 636 of *Lindley on Partnership*, 10th Edn.). In this suit both the partnership and the claim based upon the properties being joint family properties are disputed and we are thrown back upon the general principles to which I have referred above.

Assuming that a good *prima facie* claim to title has been made out it remains for the plaintiff to satisfy me, either that the property is in jeopardy, or, at the very least, that he will be in a worse position if the appointment of an interim receiver is delayed. In view of the caveats that have been lodged and the undertaking which the defendant is prepared to give, it is a little difficult to see in what respect the properties can now be said to be in jeopardy. It is usually easier for a party in cases of this kind to obtain an injunction than to obtain the appointment of a receiver. But where an injunction is sought, if the Court feels that it can, by imposing terms on the defendant, secure the plaintiff, in the event of the legal right being determined

in his favour, against damage from what may be done by the defendant in the meantime, and the defendant is willing to accede to the terms made by the Court an injunction will not issue. (See *Kerr on Injunctions*, 6th Edn. p. 26 and cases there cited in note (b)).

I am of opinion that an undertaking to the Court by the defendant not to deal with or dispose of any of the assets in question in this suit will secure the plaintiff's position until the trial of the issues in the suit and I am, therefore, of the opinion that this is not a case in which an injunction would be granted. Still less is it a case where the defendant, who is in possession, should be ousted from that possession by the appointment of a receiver before the plaintiff has finally established his right.

Accordingly, upon the defendant giving an undertaking on the terms indicated above there will be no order on this motion. If the parties are unable to agree upon the wording of the undertaking to be given its exact terms can be settled in Chambers.

Order accordingly.

SIN YONG CHANG v. PUBLIC PROSECUTOR

[A. Cr. J. (Russell J.) February 11, 1949]

[K. L. — Criminal Appeal No. 50 of 1948]

Excise Enactment (Cap. 133), s. 62(c) — Excise Rules 1923 — Keeping dutiable liquor on licensed premises — When duty is payable — Bail pending appeal — Procedure on appeal.

This was an appeal against the conviction of the appellant on a charge of knowingly keeping on licensed premises intoxicating liquor on which excise duty had not been paid. The liquor, the subject matter of the charge, was at the time of the alleged offence in the manufacturing part of the distillery and one of the grounds of appeal was that the prosecution had not proved that excise duty was payable at the time of the alleged keeping of the liquor.

Held: (1) excise duty on intoxicating liquor manufactured locally in a distillery is payable only on removal from the distillery; (2) on the facts of this case as the liquor was at the time of the alleged offence in the manufacturing part of the distillery, no duty was payable in respect of such liquor at that time and therefore no offence under s. 62(c) of the Excise Enactment had been committed by the appellant.

Where the only punishment inflicted is a fine and the fine is paid an appellant ought not to be called upon to furnish bail pending appeal.

CRIMINAL APPEAL from District Judge.

E. D. Shearn for the appellant.

M. Suffian (D. P. P.) for the respondent.

Russell J. : — The appellant was charged before the District Judge, Selangor, with the following offence:—

That you, Sin Yong Chang, on or about 30th October 1948 at 12.30 p.m. did knowingly keep on the licensed premises of the Tai Kwang Distillery, Setapak, intoxicating liquor to wit 604 gallons contained in 8 jars on which the Excise duty leviable by law, namely \$1,374.83 cts.